No. 91-561

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

MAHINDER S. UBEROI,

Petitioner,

v.

UNIVERSITY OF COLORADO, a State Institution, WILLIAM MCINERNY, JOE ROY, GARY ARAI, JOHN HOLLOWAY, and RICHARD THARP,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF COLORADO

BRIEF FOR RESPONDENTS IN OPPOSITION

JOHN ROGER MANN*
COOPER & KELLEY, P.C.
1660 Wynkoop Street,
Suite 900
Denver, Colorado 80202-1197
(303) 825-2700

Attorneys for Respondents

*Counsel of Record

QUESTIONS PRESENTED

This is a civil rights action brought by a *pro se* litigant against a State University and its officers, based on the brief detention of the Petitioner resulting from his trespass on University property. The trial court intially dismissed the complaint on the ground that the Respondents were not subject to suit under 42 U.S.C. § 1983, but the Colorado Supreme Court reversed, holding that the University was a "person" subject to suit under § 1983. After remand, the trial court granted summary judgment for Respondents based on Petitioner's failure to establish the deprivation of any federal constitutional right. During the pendency of the appeal, the Supreme Court overruled the prior decision of the Colorado Supreme Court, effectively reinstating the trial court's order of dismissal. The Colorado Court of Appeals affirmed and the Colorado Supreme Court denied certiorari. The questions presented are as follows:

1. Whether the Colorado Court of Appeals correctly held that the University of Colorado and its officials acting in their official capacities are not "persons" subject to suit under 42 U.S.C. § 1983 in affirming the judgment of the trial court after this Court's intervening decision in *Will* v. *Michigan Department of State Police,* 491 U.S. 58 (1989)?

2. Whether Petitioner has adequately preserved any of his other issues for Supreme Court review?

STATEMENT PURSUANT TO RULE 29.1

Respondents are not corporations and have no parent companies, subsidiaries or affiliates.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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Respondents, the University of Colorado, a State Institution, William McInerny, Joe Roy, Gary Arai, John Holloway, and Richard Tharp, respectfully request that this Court deny the petition for a writ of certiorari, seeking review of the decision of the Court of Appeals of the State of Colorado in this case.

OPINION BELOW

The opinion of the Court of Appeals of the State of Colorado (Pet. App. a2-a5) is unpublished and unreported. See Colo. App. R. 35(f).

JURISDICTION

The judgment of the Court of Appeals of the State of Colorado was entered on December 7, 1989. On November 19, 1990, the Supreme Court of the State of Colorado denied a petition for certiorari to the Colorado Court of Appeals. The petition for writ of certiorari was filed in this Court on April 18, 1991. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

STATUTES INVOLVED

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1988. Proceedings in vindication of civil rights; attorney's fees

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses

against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1982, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

COLO. REV. STAT. § 13-17-101. Legislative declaration

The general assembly recognizes that courts of record of this state have become increasingly burdened with litigation which is straining the judicial system and interfering with the effective administration of civil justice. In response to this problem, the general assembly hereby sets forth provisions for the recovery of attorney fees in courts of record when the bringing or defense of an action, or part thereof (including any claim for exemplary damages), is determined to have been substantially frivolous, substantially groundless, or substantially vexatious. All courts shall liberally construe the provisions of this article to effectuate substantial justice and comply with the intent set forth in this section.

COLO. REV. STAT. § 13-17-102. Attorney fees

(1) Subject to the provisions of this section, in any civil action of any nature commenced or appealed in any court of record in this state, the court may award, except as this article otherwise provides, as

part of its judgment and in addition to any costs otherwise assessed, reasonable attorney fees.

(2) Subject to the limitations set forth elsewhere in this article, in any civil action of any nature commenced or appealed in any court of record in this sate, the court shall award, by way of judgment or separate order, reasonable attorney fees against any attorney or party who has brought or defended a civil action, either in whole or in part, that the court determines lacked substantial justification.

(3) When a court determines that reasonable attorney fees should be assessed, it shall allocate the payment thereof among the offending attorneys and parties, jointly or severally, as it deems most just, and may charge such amount, or portion thereof, to any offending attorney or party.

(4) The court shall assess attorney fees if, upon the motion of any party or the court itself, it finds that an attorney or party brought or defended an action, or any part thereof, that lacked substantial justification or that the action, or any part thereof, was interposes for delay or harassment or by other improper conduct, including, but not limited to, abuse of discovery procedures available under the Colorado rules of civil procedure or a designation by a defending party under section 13-21-111.5(3) that lacked substantial justification. As used in this article, "lacked substantial justification" means substantially frivolous, substantially groundless, or substantially vexatious.

(5) No attorney fees shall be assessed if, after filing suit, a voluntary dismissal is filed as to any claim or action within a reasonable time after the attorney or party filing the dismissal knew, or reasonably should

have known, that he would not prevail on said claim or action.

(6) No party who is appearing without an attorney shall be assessed attorney fees unless the court finds that the party clearly knew or reasonably should have known that his action or defense, or any part thereof, was substantially frivolous, substantially groundless, or substantially vexatious; except that this subsection (6) shall not apply to situations in which an attorney licensed to practice law in this state is appearing without an attorney, in which case, he shall be held to the standards established for attorneys elsewhere in this article.

(7) No attorney or party shall be assessed attorney fees as to any claim or defense which the court determines was asserted by said attorney or party in a good faith attempt to establish a new theory of law in Colorado.

(8) The provisions of this section shall not apply to traffic offenses, matters brought under the provisions of the "Colorado Children's Code", title 19, C.R.S., or related juvenile matters, or matters involving violations of municipal ordinances.

STATEMENT OF THE CASE

This is a civil rights action under 42 U.S.C. § 1983 brought in state court against a state university and its officers. Petitioner Mahinder S. Uberoi is a professor of engineering at the University of Colorado. Petitioner is not a licensed attorney.

Respondent University of Colorado is an institution of higher education established and maintained by the State of Colorado pursuant to COLO. CONST. art. VIII, § 5 and COLO. REV. STAT. § 23-20-101 *et seq.* (1988). Respondent William

McInerny is Executive Officer for the Joint Institute for Laboratory Astrophysics (JILA), a research institution jointly operated by the University of Colorado and the United States Department of Commerce, National Bureau of Standards. Respondents Joe Roy and Gary Arai are police officers with the University of Colorado Police Department. Respondent John Holloway is executive assistant to the Chancellor of the University. Respondent Richard Tharp is an attorney in the Office of University Counsel.

All of Petitioner's claims arose from a single incident that occurred on the afternoon of May 12, 1982. That afternoon, Petitioner Uberoi appeared at Respondent McInerny's office without notice or an appointment and requested inspection of various JILA records. McInerny asked Petitioner to wait in a reception area, where Petitioner handed the receptionist a note requesting to inspect "detailed monthly expenditures of the account of the JILA Administration, for the current fiscal year." After reviewing Petitioner's note, McInerny checked with the Chairman of JILA, who advised him to call University Counsel about whether or not such information had to be disclosed. As McInerny was about to call University Counsel, he was informed by an assistant that Petitioner's conduct in the reception area was becoming disruptive and hostile.

McInerny entered the reception area and observed that Petitioner had planted himself in the middle of the doorway that was the only passageway from the McInerny's office and the hallway. Petitioner was asked to leave the office but refused to do so. Instead, he demanded an immediate reponse to his request to inspect JILA records. McInerny again asked Petitioner to wait in the reception area and Petitioner again refused to leave.

According to Petitioner, McInerny then pushed him out of the doorway, "slammed the door hard" against Petitioner, then beat Petitioner on his chest and stomach with his fists and kicked him with his feet. This scuffle was allegedly

accompanied by some hyperbolic verbal abuse by McInerny directed at Petitioner. Although Respondents emphatically deny Petitioner's account of the facts, they accepted it as true for purposes of their motion for summary judgment, as did the trial court. (Pet. App. a6-a17).

When Petitioner still refused to leave, a JILA staff member called police, and Officers Roy and Arai responded. After questioning Petitioner and McInerny, Officer Roy advised Petitioner that his conduct violated COLO. REV. STAT. § 18-9-109 (1980), and asked him to wait with Officer Arai while he and McInerny conferred with Respondent Holloway about Petitioner's request. Holloway instructed McInerny not to produce the JILA records requested by Petitioner. Respondent Tharp was not present at JILA on May 12, 1982, and was never called by anyone about this incident. During this time, Petitioner attempted to leave, but was restrained by Officer Arai.

Roy and McInerny returned to the reception area and informed Petitioner that his request for inspection was denied. Although Petitioner was issued a warning, he was not arrested or charged with any offense. After being briefly detained, Petitioner was released without being arrested or charged. His detention for questioning lasted only about twenty minutes. At the time of the incident, all individual Respondents were acting within the course and scope of their employment with the University of Colorado and in their official capacities therewith.

Although Petitioner asserts that his request to inspect JILA records was made pursuant to the Colorado Open Records Act, COLO. REV. STAT. § 24-72-201 *et seq.* (1982), as of May 12, 1982, the University of Colorado was not subject to that legislation, as the Colorado Supreme Court ruled in a lawsuit brought by this same Petitioner. *See Uberoi* v. *University of Colorado*, 686 P.2d 785 (Colo. 1984). The Colorado Open Records Act was not amended by the Colorado General

Assembly to subject the University of Colorado to its provisions until June 6, 1985. *See* COLO. SESS. LAWS 1985, ch. 208, § 1; COLO. REV. STAT. § 24-72-202(1.5) (1988). Therefore, at the time of the incident giving rise to Petitioner's suit, neither Petitioner nor anyone else had any statutory right to inspect the University records in question.

On May 9, 1983, Petitioner filed suit, alleging civil rights violations under § 1983 and various common law tort claims. The first six tort claims were pleaded as slander, assault, and battery against McInerny, assault and battery against Arai, and false arrest against both Roy and Arai. The seventh claim alleged violation of Petitioner's constitutional rights under the First, Fourth, Fifth, Ninth, Tenth, and Fourteenth Amendments. The eighth claim was for negligent hiring by the University of the other Respondents, and the ninth claim also asserted various claims sounding in negligence. The tenth claim was against all Respondents for conspiracy to violate Petitioner's civil rights. The eleventh claim asserted deprivation of due process under the Fourteenth Amendment. Petitioner's complaint sought only money damages; although Petitioner subsequently attempted to amend the complaint "by interlineation" to seek injunctive relief, leave to amend was neither sought nor granted by the trial court.

On December 19, 1983, the trial court dismissed Petitioner's civil rights claims, holding that the word "person" as it appears in § 1983 does not include states. Petitioner's state law tort claims had previously been dismissed on December 13, 1983, for his failure to comply with the notice requirement of the Colorado Governmental Immunity Act, COLO. REV. STAT. § 24-10-109 (1982).

Petitioner appealed to the Colorado Supreme Court, which affirmed the trial court's judgment of dismissal of the tort claims, but reversed its dismissal of the § 1983 claims, holding that the University of Colorado was a "person" subject to suit under § 1983. *Uberoi* v. *University of Colorado*, 713 P.2d 894 (Colo. 1986). After remand, summary judgment

was granted on October 8, 1987 for all Respondents based upon Petitioner's failure to show the deprivation of any clearly established federal constitutional right, and upon official immunity for discretionary acts (Pet. App. a6-a17).

Petitioner appealed the summary judgment to the Colorado Supreme Court, which transferred the case to the Colorado Court of Appeals for lack of jurisdiction. *Uberoi* v. *University of Colorado* (Colo. No. 87SA447, January 20, 1988). Because the Respondents' claim for attorney fees under COLO. REV. STAT. § 13-17-101 *et seq.* (1987) had not been resolved by the trial court, the Colorado Court of Appeals dismissed the appeal for lack of a final appealable order under COLO. APP. R. 1. *Uberoi* v. *University of Colorado* (Colo. App. No. 88CA0115, February 2, 1988).

After hearing, on April 20, 1988, Respondents were awarded attorney fees and costs pursuant to COLO. REV. STAT. § 13-17-102 (1987), upon the trial court's finding that Petitioner's claims lacked substantial justification. Petitioner has failed to include the trial court's order awarding attorney fees and costs in the Appendix to his Petition for Writ of Certiorari.

Petitioner appealed the final order of the trial court to the Colorado Court of Appeals, which affirmed on all grounds. *Uberoi* v. *University of Colorado* (Colo. App. No. 88CA0714, December 7, 1989) (not selected for official publication) (Pet. App. a2-a5).

On June 15, 1989, between the time the trial court entered summary judgment for Respondents and the time the Colorado Court of Appeals issued its decision, this Court decided *Will* v. *Michigan Department of State Police*, 491 U.S. 58 (1989). Relying on *Will*, the Colorado Court of Appeals affirmed the judgment on the ground that the trial court lacked subject matter jurisdiction. As the Colorado Court of Appeals observed, the holding in *Will*, "in essence, validated the trial court's original conclusion that subject

matter jurisdiction was lacking." *Uberoi* v. *University of Colorado, supra*, slip op. at 2 (Pet. App. a3-a4).

The Colorado Court of Appeals also determined that Petitioner's appeal was "relete with arguments that have no basis in law or facts, which plaintiff reasonably should have known," and that "the manner in which this appeal has been prosecuted has been vexatious" (Pet. App. a5). Based on this finding, the Colorado Court of Appeals awarded Respondents their attorney fees incurred in the appeal pursuant to COLO. APP. R. 38(d) (*id.*).

Uberoi's petition for rehearing was denied by the Colorado Court of Appeals on March 29, 1990 (Pet. App. a1-a2).

On November 19, 1990, Petitioner's petition for writ of certiorari to the Colorado Court of Appeals was denied by the Colorado Supreme Court (Colo. No. 90SC361) (Pet. App. a1).

Because of his propensity for bringing frivolous and vexatious litigation, Petitioner has been permanently enjoined from any further *pro se* appearance in both the Twentieth Judicial District of the State of Colorado and the United States District Court for the District of Colorado. *University of Colorado* v. *Uberoi* (Colo. App. No. 89CA0124, October 18, 1990) (not selected for official publication), *cert. denied*, (Colo. No. 90SC752, April 15, 1991); *Board of Regents of the University of Colorado* v. *Uberoi* (Civ. No. 88-F-1323) (D. Colo., September 25, 1989), *aff'd*, (Nos. 89-1117, 89-1304, 89-1337) (10th Cir., May 25, 1990), *reh'g denied*, (10th Cir., July 6, 1990).

REASONS FOR DENYING THE PETITION

I.

Petitioner's only issues which raise questions of federal law concern his claims for relief under 42 U.S.C. § 1983 and the effect of this Court's intervening decision which overruled

the prior decision of the Colorado Supreme Court in this case. Because the decision of the Colorado Court of Appeals rendered after this Court's intervening decision in conformity therewith was correct, it should not be reviewed.

A.

In *Will* v. *Michigan Department of State Police*, 491 U.S. 58 (1989), this Court held that "States or governmental entities that are considered to be 'arms of the State' for Eleventh Amendment purposes" are not "persons" within the meaning of 42 U.S.C. § 1983. The Court based its holding on a review of Congressional intent in enacting § 1983, concluding that there was:

> nothing substantial in the legislative history that leads use to believe that Congress intended that the word "person" in § 1983 included the States of the Union.

Id., 491 U.S. at 69. *See also Ngiraingas* v. *Sanchez*, 495 U.S. 182 (1990).

The Court went on to hold that state officials acting in their official capacity are also immune from suit under § 1983. As Justice White explained:

> [A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. *Brandon* v. *Holt*, 469 U.S. 464, 471 (1985). ***As such, it is no different from a suit against the State itself.*** *See, e.g., Kentucky* v. *Graham*, 473 U.S. 159, 165-166 (1985); *Monell, supra* [v. *New York Dept. of Social Services*, 436 U.S. 658 (1983)], at 690, n. 55. We see no reason to adopt a different rule in the present context, particularly when such rule would allow petitioner to circumvent congressional intent by a mere pleading device. [Emphasis added.]

Will v. *Michigan Dept. of State Police, supra,* 491 U.S. at 71.

In its opinion in Will, the Court disapproved and overruled the Colorado Supreme Court's decision in *Uberoi* v. *University of Colorado,* 713 P.2d 894, 900-901 (Colo. 1986), which held, in the instant case, that the University of Colorado was a "person" subject to suit under § 1983. This Court cited the Colorado Supreme Court's decision in *Uberoi* v. *University of Colorado* as an example of the courts that "have taken the position that a State is a person under § 1983." *Will* v. *Michigan Department of State Police,* 491 U.S. at 61, n. 3.

Because the University of Colorado is considered an "arm of the state" for purposes of Eleventh Amendment immunity, *see Rozek* v. *Topolnicki,* 865 F.2d 1154 (10th Cir. 1989); *see also* COLO. CONST. art. VIII, § 5; COLO. REV. STAT. § 23-20-101 *et seq.* (1988), and because a State, its agencies, and its officials in their official capacities, which include the University, its Board of Regents, and its officers and agents, are immune from prosecution in state court under § 1983, all of Petitioner's § 1983 claims against the Respondents, who are sued in their official capacities, are barred. *Will* v. *Michigan Department of State Police, supra.* The Colorado Court of Appeals was correct in so holding.

Petitioner contends that *Will* did not overrule the Colorado Supreme Court's prior determination that the University was a "local governing body" subject to suit under § 1983 pursuant to *Monell* v. *Department of Social Services,* 436 U.S. 658 (1978). However, this is not what the Colorado Supreme Court held; it held only that the University of Colorado is a "person" subject to suit under § 1983:

> Even though *Monell* did not specifically address the question of whether a state university is a "person" under § 1983, its reasoning logically requires us to conclude that a state university is a "person" within the meaning of § 1983.

Uberoi v. *University of Colorado, supra,* 713 P.2d at 900. Petitioner's contention is thus incorrect: *Will* ***explicitly*** overruled this determination. Recent appellate decisions from Colorado have also recognized that *Will* precludes suit under § 1983 against a state agency or state official in his official capacity. *See Lucchesi* v. *State of Colorado,* 807 P.2d 1185 (Colo. App. 1990); *Wigger* v. *McKee,* 809 P.2d 999 (Colo. App. 1990); *Stjernholm* v. *Colorado State Board of Chiropractic Examiners,* ____ P.2d ____ (Colo. App. No. 90CA1385, September 12, 1991); *see also Ruark* v. *Colorado Department of Corrections,* 928 F.2d 947, 950 (10th Cir. 1991).

In any event, if the Colorado Supreme Court determined that a state university, chartered by the state constitution, is a "local governing body" subject to suit under § 1983, then it was in error. The test in *Will* is whether the governmental entity is considered an "arm of the State" for purposes of Eleventh Amendment immunity. This Court expressly limited the holding in *Monell* to "local government units which are not considered part of the State for Eleventh Amendment purposes." *Monell* v. *Department of Social Services, supra,* 436 U.S. at 690, n. 54. *See, e.g., Mt. Healthy City School District Board of Education* v. *Doyle,* 429 U.S. 274 (1977). In *Quern* v. *Jordan,* 440 U.S. 332, 338 (1979), the Court made clear not only that § 1983 does not abrogate the States' Eleventh Amendment immunity, but also that the holding in *Monell* is limited to local government units such as municipalities which are not part of the State. Consequently, if a governmental entity is not a "local government unit" but an "arm of the State," then it is immune from liability under § 1983 because it is not a "person" who is subject to suit.

Whether a governmental entity is considered an "arm of the State" for purposes of Eleventh Amendment immunity is a question of federal constitutional law. *See Mt. Healthy City School District Board of Education* v. *Doyle, supra,* 429 U.S. at 279-281. The tests for whether a governmental entity is an arm of the State, as distinguished from so-called political

subdivisions such as counties, municipalities, and other "local governing bodies," are: (1) to what extent does the entity, although carrying out a state mission, function with substantial autonomy from the state government, and (2) to what extent is the entity financed independently of the state treasury. *See Unified School District No. 480* v. *Epperson*, 583 F.2d 1118, 1121-1122 (10th Cir. 1978). The bar of the Eleventh Amendment also extends to suits against state officials acting in their official capacities. *Ford Motor Co.* v. *Department of Treasury of Indiana*, 323 U.S. 459 (1945).

State universities are generally subject to the complete control of and are financed by the state. *See Brennan* v. *University of Kansas*, 451 F.2d 1287 (10th Cir. 1971). Thus, in the context of a § 1983 action, state colleges and universities are generally held to be "arms of the State" which are immune from suit under the Eleventh Amendment. *See Hamilton Manufacturing Co.* v. *Trustees of State Colleges*, 356 F.2d 599, 601 (10th Cir. 1966); *Williams* v. *Eaton*, 443 F.2d 422, 427-429 (10th Cir. 1971); *Prebble* v. *Brodrick*, 535 F.2d 605, 609-610 (10th Cir. 1976); *Korgich* v. *Regents of New Mexico School of Mines*, 582 F.2d 549, 551-552 (10th Cir. 1978); *Brennan* v. *University of Kansas*, 451 F.2d at 1290-1291. ***Accord:*** *Ronwin* v. *Shapiro*, 657 F.2d 1071, 1072-1074 (9th Cir. 1981); *Rutledge* v. *Shapiro*, 660 F.2d 1345, 1349-1350 (9th Cir. 1981), *aff'd sub nom. Kush* v. *Rutledge*, 460 U.S. 719 (1983); *Clay* v. *Texas Women's University*, 728 F.2d 714 (5th Cir. 1984); *Hall* v. *Medical College of Ohio*, 742 F.2d 299, 301-302 (6th Cir. 1984), *cert. denied*, 469 U.S. 1113 (1985); *Bailey* v. *Ohio State University*, 487 F. Supp. 601 (S.D. Ohio 1980); *Vaughn* v. *Regents of University of California*, 504 F. Supp. 1349, 1352-1354 (E.D. Cal. 1981); *Kompara* v. *Board of Regents of the State University & Community College System of Tennessee*, 548 F. Supp. 537 (M.D. Tenn. 1982); *Hutchins* v. *Board of Trustees of Michigan State University*, 595 F. Supp. 862 (W.D. Mich. 1984); *Johnson* v. *University of Nevada*, 596 F. Supp. 175 (D. Nev. 1984); *Hoferek* v. *University of Missouri*, 604 F. Supp. 938 (W.D. Mo. 1985). *Cf.*

Weisbord v. *Michigan State University*, 495 F. Supp. 1347 (W.D. Mich. 1980) (dismissing § 1983 action because of Eleventh Amendment immunity despite finding that state university was "person" under § 1983).

In particular, the University of Colorado is an institution of the State of Colorado, and is not a "local governing body" such as a county or municipality. The Colorado Constitution provides that the establishment and management of the University of Colorado "shall be subject to the control of the state, under the provisions of the constitution and such laws as the general assembly may provide." COLO. CONST. art. VIII, § 5(1). *See City of Boulder* v. *Regents of University of Colorado*, 179 Colo. 420, 501 P.2d 123 (1972); *see also Colorado Civil Rights Commission* v. *Regents of the University of Colorado*, 759 P.2d 726, 727 (Colo. 1988). The Board of Regents of the University of Colorado is a body corporate which is a part of the State of Colorado; it is the department of the State to which is entrusted the supervision and government of the University. COLO. CONST. art. IX, § 12; *see In re Macky's Estate*, 46 Colo. 79, 102 P. 1075 (1909). Under COLO. CONST. art. VIII, § 5, this body corporate is under the control of the General Assembly. Vacancies on the Board are filled by the governor. COLO. REV. STAT. § 23-20-105 (1988).

Although the Board of Regents has broad powers in governing the University, *see* COLO. REV. STAT. § 23-20-111 (1988), its powers of investment and funding are limited. It does not have the power to levy or collect taxes, and it must report regularly to the General Assembly on its investments. *See* COLO. REV. STAT. §§ 23-20-118 to 23-20-121 (1988). The Board is represented in lawsuits by the Attorney General of the State of Colorado, *see* COLO. REV. STAT. § 23-20-110 (1988), and no claim against the University may be settled without the Attorney General's consent. *See* COLO. REV.

STAT. § 24-10-112 (1989). While the Board may solicit donations, *see* COLO. REV. STAT. § 23-20-120 (1988), the University is, for the most part, financed directly from the state treasury. *See* COLO. REV. STAT. §§ 23-1-104, 23-1-105 (1988).

More than eighty years ago, the Colorado Supreme Court declared that the Board of Regents:

> is fostered by the State. Appropriations are made and confided to it, which are raised by taxation upon the property of the people of the state. It is a public corporation in which the Regents have no private interest whatever. It is an agency of the state for the government of the University. Its property and rights are the property and rights of the state.

In re Macky's Estate, supra, 46 Colo. at 96, 102 P. at 1081.

Because the University is a dependent instrumentality of the State of Colorado, and is not an autonomous political subdivision such as a city or school district, the test for whether the University of Colorado is an "arm of the State" for purposes of Eleventh Amendment immunity is thus satisfied. In *Rozek* v. *Topolnicki, supra*, the United States Court of Appeals for the Tenth Circuit answered this very question with respect to the University of Colorado:

> The district court did not err in concluding that . . . the University of Colorado [is] entitled to Eleventh Amendment immunity in this case. Moreover, Congress did not abrogate the states' Eleventh Amendment immunity when it enacted 42 U.S.C. § 1983. *Quern* v. *Jordan*, 440 U.S. 332 (1979).

Id., 865 F.2d at 1158. *See also Martinez* v. *Board of Regents* (Civ. No. 82-F-377, slip op.) (D. Colo., September 9, 1982); *Kimboko* v. *Regents of University of Colorado* (Civ. No. 83-JM-2270, slip op.) (D. Colo., April 4, 1984).

Hence, because the University of Colorado is an "arm of the State" which is immune from suit in federal court under

the Eleventh Amendment, neither it nor any of its officers acting in their official capacities is a "person" which is subject to suit under § 1983. *Will* v. *Michigan Department of State Police, supra.*

Consequently, because this Court's decision in *Will* directly overruled the Colorado Supreme Court's prior decision in this case which reversed the trial court's prior dismissal of Petitioner's § 1983 claims on the ground that the Respondents could not be sued under § 1983, the Colorado Court of Appeals correctly held that Petitioner's civil rights claims cannot be maintained, and its decision should not be reviewed.

B.

Petitioner next asserts that the trial court still retains subject matter jurisdiction over his § 1983 claims against the Respondents in their personal capacities and his alleged claims for injunctive relief under § 1983. Respondents do not deny that the Court's decision in *Will* concerned only suits against State officials in their official capacities, and that suits under § 1983 may still be maintained against State officials in their personal capacities. *See Kentucky* v. *Graham*, 473 U.S. 159 (1985). Nor do Respondents dispute that a suit for injunctive relief may be maintained against a State official in his official capacity under § 1983. *See Will* v. *Michigan Department of State Police, supra*, 491 U.S. at 71, n. 10.

Nevertheless, these issues are not properly before this Court. First, Petitioner did not seek injunctive relief in the trial court. Although Petitioner attempted to amend his complaint to seek injunctive relief, leave to amend was neither sought nor granted by the trial court. Failure to preserve this issue below precludes its consideration by this Court. *See Bankers Life & Casualty Co.* v. *Crenshaw*, 486 U.S. 71, 76-80 (1988).

Similarly, Petitioner has failed to preserve for review the issue concerning remand of his personal capacity claims. Petitioner has ignored SUP. CT. R. 14.1(h) by failing to specify the stage of the proceedings in which this question sought to be reviewed was raised. The record shows that this issue was never raised by Petitioner either in his Petition for Rehearing in the Colorado Court of Appeals, or in his Petition for Writ of Certiorari in the Colorado Supreme Court. Hence, this issue, too, has not been preserved for Supreme Court review. *See Bankers Life & Casualty Co.* v. *Crenshaw, supra.*

Moreover, the trial court expressly ruled on the merits of Petitioner's § 1983 claims against the Respondents in their personal capacities in its October 8, 1987 order granting summary judgment. (Pet. App. 6a-23a). The trial court found that, even viewing the allegations of the complaint in the light most favorable to Petitioner, he had failed to demonstrate that the Respondents had deprived him of any clearly established federal constitutional right. *See Harlow* v. *Fitzgerald,* 457 U.S. 800, 815-819 (1982); *Mitchell* v. *Forsyth,* 472 U.S. 511, 530-535 (1985). In so doing, the trial court presumed that the Respondents were acting under color of State law; hence, Petitioner's issues concerning whether Respondents were acting under color of State law and the alleged violation of his constitutional rights not only have not been preserved for review, but they are also moot.

Further, as indicated above, because Petitioner did not seek review of the trial court's disposition of his personal capacity claims against the individual Respondents in either the Colorado Court of Appeals or the Colorado Supreme Court, he has failed to preserve this issue for review, as it was neither pressed nor passed upon in the state court.

C.

In his only other issue which raises any question of federal law, Petitioner asserts that COLO. REV. STAT. § 13-17-101 *et seq.* (1987) does not apply to awards of attorney fees for groundless and frivolous litigation under § 1983. Once again, this issue was neither passed on by the Colorado Court of Appeals nor raised in either Petitioner's Petition for Rehearing to that court or in his Petition for Writ of Certiorari to the Colorado Supreme Court. Accordingly, it has not been adequately preserved for Supreme Court review. *See Bankers Life & Casualty Co.* v. *Crenshaw, supra.*

Nevertheless, the trial court properly applied the statute to this proceeding. The trial court held that COLO. REV. STAT. § 13-17-102 (1987) applied to all claims brought by Plaintiff in state court, including his federal civil rights claims. *See* COLO. REV. STAT. § 13-17-102(1) (1987) (court may award attorney fees "in any civil action of any nature"). Petitioner's argument that this statute is "preempted" by 42 U.S.C. § 1988 is not well taken. Section 1988 expressly provides for concurrent state and federal jurisdiction and the applicability of state law, including state statutes, and does not preempt state law, insofar as it is not "inconsistent" with § 1988. In resolving questions of consistency between state and federal law raised under § 1988, courts must look not only at particular federal statutes, but also at the policies expressed in them; of particular importance is whether application of the state law would be inconsistent with the federal policy underlying the cause of action under consideration. *Robertson* v. *Wegmann,* 436 U.S. 584, 590 (1978). Moreover, state law is to be "borrowed" when appropriate under § 1988. *See Board of Regents* v. *Tomanio,* 446 U.S. 478, 483-486 (1980).

Section 1988, like COLO. REV. STAT. § 13-17-102, authorizes an award of attorney fees to a prevailing defendant when an action under § 1983 has been determined to be frivolous, vexatious, unreasonable, or without foundation, even in the

absence of subjective bad faith on the plaintiff's part. *See Hensley* v. *Eckerhart*, 461 U.S. 424, 429, n. 2 (1983); *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 421 (1978). "[N]eedless to say, if a plaintiff is found to have brought or continued such a claim in *bad faith*, there will be an even stronger basis for charging him with the attorney's fees incurred by the defense." *Christiansburg Garment Co.* v. *EEOC, supra*, 434 U.S. at 422 (emphasis original). Hence, the state policy expressed in the legislative declaration of COLO. REV. STAT. § 13-17-101, which is to relieve courts that have "become increasingly burdened with litigation which is straining the judicial system and interfering with the effective administration of civil justice" by providing for assessment of attorney fees against parties who bring actions that are groundless, frivolous, or vexatious, is fully consistent with the federal policy embodied in § 1988 to compensate prevailing defendants where the plaintiff's action has been found frivolous, vexatious, unreasonable, or without foundation. *See Christiansburg Garment Co.* v. *EEOC, supra; Western United Realty, Inc.* v. *Isaacs*, 679 P.2d 1063, 1065-1069 (Colo. 1984).

Here, the trial court made explicit findings that Petitioner's action was groundless and that his conduct in bringing and continuing it was vexatious. (Pet. App. 3a-4a, 24a-25a). For this reason, the application of COLO. REV. STAT. § 13-17-101 *et seq.* to Petitioner's action under § 1983 is not in any way "inconsistent" with § 1988, and thus the Colorado Court of Appeals did not err in holding that COLO. REV. STAT. § 13-17-102 applied to § 1983 actions brought in state court that lack substantial justification.

Furthermore, the Complaint asserted nine state law tort claims, which are fully subject to COLO. REV. STAT. § 13-17-102. Section 1988 does not apply to those claims. *See North Carolina Dept. of Transportation* v. *Crest Street Community Council, Inc.*, 479 U.S. 6, 11-15 (1986); *see also Brown* v. *City of Colorado Springs*, 749 P.2d 475, 477 (Colo. App. 1987).

II.

Petitioner raises a number of other issues, many for the first time here. Therefore, these issues have not been adequately preserved for review. In any event, these issues do not implicate either the jurisdiction of this Court or any ground for issuance of a writ of certiorari to the Colorado Court of Appeals.

A.

Petitioner's challenge to the constitutionality of COLO. REV. STAT. § 18-9-109 (1980) was not raised in the trial court; his challenge to the constitutionality of COLO. REV. STAT. § 13-17-101 *et seq.* (1987) and COLO. R. CIV. P. 11 was raised neither in the trial court nor in the Colorado Court of Appeals. Questioning the constitutionality of a statute for the first time on appeal in a state court will not successfully raise the issue for review by the Supreme Court. *See Board of Directors of Rotary International* v. *Rotary Club of Duarte*, 481 U.S. 537, 550 (1987). Questioning the constitutionality of a state statute for the first time on petition for writ of certiorari also will not successfully raise the issue for review by this Court. *See Head* v. *New Mexico Board of Examiners in Optometry*, 374 U.S. 424, 433, n. 12 (1963); *Tacon* v. *Arizona*, 410 U.S. 351, 352 (1973); *Monks* v. *New Jersey*, 398 U.S. 71, 72 (1970).

In any event, Petitioner's argument that COLO. REV. STAT. § 13-17-101 *et seq.* violates equal protection because it does not provide for an award of attorney fees to a *pro se* litigant is patently meritless. A *pro se* litigant who is not an attorney is not entitled to an award of attorney fees. *Kay* v. *Ehrler*, ____ U.S. ____, 111 S. Ct. 1435, 113 L. Ed. 2d 486 (1991). *See also Hittson* v. *Browne*, 3 Colo. 304, 309 (1877).

B.

Petitioner argues, in an indefinite way, that various actions of the trial court and/or the Colorado Court of Appeals violated his alleged rights to due process and/or equal protection. Most of these issues were not raised by Petitioner either in the trial court, in the Colorado Court of Appeals, in his Petition for Rehearing to the Colorado Court of Appeals, or in the Colorado Supreme Court, nor were they passed upon by any of these courts, and, therefore, these issues should not be considered on petition for writ of certiorari. *See Bankers Life & Casualty Co.* v. *Crenshaw, supra; Dewey* v. *Des Moines,* 173 U.S. 193, 198-200 (1899); *see also* SUP. CT. R. 14.1(h). In particular, the issue concerning the custom and practice of the Colorado Court of Appeals to deny oral argument to *pro se* litigants was never raised below, and Supreme Court review is therefore foreclosed. *See Tacon* v. *Arizona, supra; Head* v. *New Mexico Board of Examiners in Optometry, supra.*

Although Petitioner claims that these various orders have denied him "due process" and/or "equal protection", he does not expressly allege that such alleged denials were denials of the "due process" or "equal protection" guaranteed by the Fourteenth Amendment to the United States Constitution. A generic reference to "due process" or "equal protection" is not sufficient to preserve a *federal* claim, *see Bankers Life & Casualty Co.* v. *Crenshaw, supra,* particularly where the state constitution contains similar provisions guaranteeing due process and equal protection of the laws. *See* COLO. CONST. art. II, §§ 6, 25. Petitioner does not identify the federal constitution as the source of his alleged rights. Thus, even if Petitioner has preserved his constitutional challenge, it is unclear whether he has presented an issue of federal or state law. *See Webb* v. *Webb,* 451 U.S. 493, 495-501 (1981); *Bankers Life & Casualty Co.* v. *Crenshaw, supra.* For this reason, review should be denied.

C.

Finally, the remaining issues raised by Petitioner involve purely questions of state law, or else Petitioner's objections to the state court's application of state law, and should therefore not be considered on petition for writ of certiorari. *See International Longshoremen's Ass'n, AFL-CIO* v. *Davis,* 476 U.S. 380, 387 (1986); *Agins* v. *City of Tiburon,* 447 U.S. 255, 260, n. 6 (1980).

This is a case of a stubborn *pro se* litigant who does not understand judicial procedure and who refuses to abide by the judgments and orders rendered against him. The trial court found that Petitioner's claims were groundless, frivolous, vexatious, and brought in bad faith. The Colorado Court of Appeals found that Petitioner's appeal was prosecuted in a vexatious manner and was replete with arguments that have no support in law or the facts. His petition for a writ of certiorari to this Court is simply more of the same. Even if his issues were not patently meritless, he has failed to preserve them in the state courts below for review by this Court, and consequently there is nothing of substance for this Court to review.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be DENIED.

Respectfully submitted,

JOHN ROGER MANN*
COOPER & KELLEY, P.C.
1660 Wynkoop Street,
Suite 900
Denver, Colorado 80202-1197
(303) 825-2700

Attorneys for Respondents

*Counsel of Record

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